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Recent Developments: Sears, Roebuck & Co. v. Gussin: Creditor Does Not Have Right to Financial Records and Data in the Possession of Accountant, Where Client Does Not Provide a Valid Waiver to the Accountant-Client Privilege

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Sears, Roebuck & Co. v. Gussin

In *Sears, Roebuck & Co. v. Gussin*, 350 Md. 552, 714 A.2d 188 (1998), the Court of Appeals of Maryland held the accountant-client privilege not to be absolute, but may generally be waived by the client for third parties to gain access to certain types of confidential information. In so holding, the court clarified the nature of the privilege noting that a client could waive the privilege through conduct of his own or through certain disclosures to third parties. While not expanding the accountant-client privilege, the court nevertheless reinforced the protection given individuals against unintended waiver of the privilege.

In August 1995, the Circuit Court for Prince George's County found that Paul Gussin ("Gussin") owed creditor Sears, Roebuck & Co. ("Sears"), a judgment in the amount of \$36,031.46. In order to enforce this judgment, Sears sought discovery of Gussin's financial records. Complying with this request, Gussin produced his 1994 federal income tax return. On his income tax return, filed jointly with his wife Jocelyn, Gussin reported \$247,787.00 in investment income, and \$161,000.00 in "other gains and losses." Gussin testified that his accountant, Ernst & Young, L.L.P. of Baltimore ("E & Y"), prepared his tax return and that any documents revealing ownership of his various investments would be

CREDITOR DOES NOT HAVE RIGHT TO FINANCIAL RECORDS AND DATA IN THE POSSESSION OF ACCOUNTANT, WHERE CLIENT DOES NOT PROVIDE A VALID WAIVER TO THE ACCOUNTANT- CLIENT PRIVILEGE

By Steven E. Shane

likely to be kept with them. Aside from the income reported on his federal income tax return, Gussin alleged that he did not own any assets of significance, including bank accounts or his residence. His wife then testified that her husband had received approximately six million dollars in the mid-1980's for his sale of a one-third interest in their shoe store business. When questioned by Sears' counsel about his ownership interest in these assets, Gussin replied that he believed Sears could better direct the questions regarding the location of his financial records to his accountant, E & Y. Specifically, Sears' counsel asked Gussin, "Would Ernst & Young have the papers also?" Gussin replied, "I imagine. I don't know. They did the tax return. You could ask

them." Thereafter, Sears served E & Y with a subpoena at their Baltimore office in order to obtain discovery of Gussin's assets and financial position.

The subpoena ordered the accounting firm to designate a representative to testify as to particular documents which related to Gussin's ownership interests in the investments reported on his 1994 federal income tax return. E & Y objected to the subpoena asserting that the firm would comply with the request only by written court order. At a July 1997 hearing in the Circuit Court for Prince George's County, Sears responded to E & Y's objections by arguing: (1) Gussin waived the accountant-client privilege through his responses at the deposition and (2) Gussin made a fraudulent conveyance of his records which precluded him from relying on the accountant-client privilege. Sears did not contend that Gussin's records were themselves not privileged information.

The circuit court ruled that the accountant-client privilege asserted by Gussin had not been waived. In response, Sears appealed to the Court of Special Appeals of Maryland. The Court of Appeals of Maryland granted certiorari on its own motion prior to its review by the intermediate appellate court.

The court of appeals reasoned that, like other privileges, the purpose of the accountant-client privilege is to open the channels of

communication between the accountant and client. *Sears*, 350 Md. at 562, 714 A.2d at 193. The privilege better enables the accountant to perform his job and, at the same time, protects the client's expectation of privacy in various types of civil matters and controversies. *Id.* (citing *In re Special Investigation No. 202*, 53 Md. App. 96, 100, 452 A.2d 458, 460 (1982)).

Moreover, according to the language of section 9-110, the privilege against disclosure by a licensed certified public accountant of the contents of any communication made by a client in the course of rendering professional services, is "clear and unambiguous." *Id.* at 563, 714 A.2d at 193 (citing MD. CODE ANN., CTS. & JUD. PROC., § 9-110 (Supp.1997)). Without express or implied authorization from the client or a valid waiver (i.e. waiver by the client's disclosure to third parties), client information remains protected from disclosure. *Id.* at 565, 714 A.2d at 194. Accordingly, Gussin's statement taken in the context of the deposition was not intended to divulge confidential documents or any other information not required to be disclosed by law. *Id.* The court reasoned that Gussin's statement, "you can ask them," while permitting Sears to inquire as to the location of specific documents, did not give E & Y discretion to disclose the contents of those documents. *Id.* at 564, 714 A.2d at 193. The court opined that, generally, a party will not

waive the privilege simply "by denying the opposing party's accusations." *Id.* at 567, 714 A.2d at 195. The court further stated that "[m]erely 'being difficult'" is not enough to justify waiver of the privilege. *Id.* Moreover, nothing in Gussin's conduct suggested to the court that he wished the documents to be anything but confidential. *Id.* The court believed Gussin's statement was "not in the nature of a disclosure such that fairness would require that the privilege cease." *Id.* Finally, the court ruled that Sears did not meet its burden of establishing waiver of the privilege.

In response to Sears' second claim of the fraudulent conveyance, the court noted that the facts did not support the application of the exception. *Id.* at 569, 714 A.2d at 196. Therefore, the court could not consider whether a fraud exception would be applicable to the accountant-client privilege. *Id.* In so doing, the court held that evidence of Gussin's previous assets were insufficient to establish a basis for fraud. *Id.* The fact that Gussin in the past had millions of dollars in assets alone, did not constitute the requisite prima facie showing of fraud. *Id.*

The court also did not consider whether the actual documents in E & Y's possession could be protected. *Id.* at 570, 714 A.2d at 196. Neither Gussin nor Sears ever raised the issue, rather both sides focused on whether the protection itself was actually

waived. *Id.* The court did note, in important dicta, that "a client may not immunize otherwise discoverable material from the reach of another party by transferring possession of those materials to an accountant." *Id.*

While accountants may hail the court's decision as buttressing the accountant-client privilege, a closer examination of the decision reveals this not to be entirely accurate. In fact, as a point of emphasis and clarification, the court opted to specifically address the argument put forth by E & Y -- that the privilege could be waived solely by express permission. The court concluded that this interpretation was not only erroneous, but neither supported by law nor policy. As such, the court refused to elevate the privilege to a higher status than most other privileges in the state (i.e. attorney-client, doctor-patient) which may be waived by the client's conduct. It is the court's view that the General Assembly did not intend such a result by enacting section 9-110. The court supported its assertion by noting that section 9-110(b) provides that the privilege itself does not affect such domains as the bankruptcy laws and criminal laws or a regulatory proceeding by the Public Accountancy Board. While the court did not rule on the question of protection of the actual documents, court dicta implied that these papers would not be immunized from discovery.

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